Supreme Court, U.S.
FILED

(1)

03 - 39 JUN 19 2003

No. _____

In The

Supreme Court of the United States

JEROME HENRY EVENSON,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR WRIT OF CERTIORARI

PAUL JOHN CAMBRIA, JR., ESQ.
Counsel of Record
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
(716) 849-1333

Counsel for Petitioner

Of Counsel:
ROGER WALTER WILCOX, JR., ESQ.

11 Centre Park
Rochester, New York 14614
(585) 232-6920

(B-2333)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

39pp

QUESTIONS PRESENTED

1. As a content-based restriction of protected speech, does Arizona Rev. Stat. § 13-3513 promote a compelling government interest in the least restrictive way?

2. Does the under-inclusiveness of Arizona Rev. Stat. § 13-3513 violate Petitioner's right to equal protection?

3. Does the vagueness of Arizona Rev. Stat. § 13-3513 violate Petitioner's due process rights?

4. Is Petitioner's newspaper, The Beat, harmful to minors as a matter of law?

PARTIES TO THE PROCEEDING

Jerome Henry Evenson,

Petitioner.

v.

The State of Arizona,

Respondent.

PARENT AND SUBSIDIARY COMPANIES

Petitioner is a sole proprietor and has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

PARENT AND SUBSIDIARY COMPANIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

POINT I

THE ARIZONA COURT OF APPEALS ERRED IN RULING THAT THE CONTENT-ORIENTED RESTRICTIONS IMPOSED ON PROTECTED EXPRESSION BY ARIZONA REV. STAT. § 13-3513 SURVIVE STRICT SCRUTITY 7

POINT II

A.R.S. § 13-3513 VIOLATES PETITIONER'S RIGHTS TO EQUAL PROTECTION UNDER THE LAW 21

POINT III

A.R.S. §13-3513 IS UNCONSTITUTIONALLY VAGUE 25

POINT IV

THE BEAT IS NOT CONSTITUTIONALLY HARMFUL TO MINORS 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases — Page

Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722 (D.C. Cir. 1993).....22

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389 (2002).....29

Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157 (1988).....9

Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941).....17

California Democratic Party v. Jones, 530 U.S. 567, 120 S.Ct. 2402 (2000).....14

Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, (1940).....25

City of Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849 (1999).....25

City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038 (1994).....22

City of Los Angeles v. Alameda Books, 535 U.S. 425, 122 S.Ct. 1728 (2002).....18

Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126 (1926).....26

Giaccio v. Pennsylvania, 382 U.S. 399,
86 S.Ct. 518 (1966).....25

Globe Newspaper Co. v. Superior Court,
457 U.S. 596, 102 S.Ct. 2613
(1982).....14, 15

Grayned v. City of Rockford, 408 U.S. 104,
92 S.Ct. 2294 (1972).....26

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676,
88 S.Ct. 1298 (1968).....28

Jacobellis v. Ohio, 378 U.S. 184,
84 S.Ct. 1676 (1964).....28

Landmark Communications, Inc. v. Virginia,
435 U.S. 829, 98 S.Ct. 1535 (1978).....15

Lanzetta v. New Jersey, 306 U.S. 451,
59 S.Ct. 618 (1939).....25

Miller v. California, 413 U.S. 15 (1973).....29

Papachristou v. City of Jacksonville, 405 U.S. 156,
92 S.Ct. 839 (1972) 25

Police Department of the City of Chicago
v. Mosley, 408 U.S. 92, 92 S.Ct. 2286 (1972) 8, 22

R.A.V. v. City of St. Paul, 505 U.S. 377,
112 S.Ct. 2538 (1992).....8, 22

Regan v. Time, Inc., 468 U.S. 641,
104 S.Ct. 3262 (1984).....8

Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528 (2002).....13

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510 (1995).....8

Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 109 S.Ct. 2829 (1989).....9

Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919).....17

Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105, 112 S.Ct. 501 (1991).....9

Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1960).....25

Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949).....17

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S.Ct. 733 (1969).....13

Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S.Ct. 2458 (1994).....9

United States v. Playboy Entertainment, Inc., 529 U.S. 803, 120 S.Ct.1878 (2000).....8, 12, 13, 14, 17, 19, 20, 29

Winters v. New York, 333 U.S. 507, 68 S.Ct. 665 (1948).....26

Statutes

Ariz. Rev. Stat. § 13-3501.....passim

Ariz. Rev. Stat § 13-3506.....passim

Ariz. Rev. Stat. § 13-3513.....passim

United States Constitution, First Amendment.....passim

United States Constitution, Fifth Amendment.....passim

United States Constitution,
Fourteenth Amendment.....passim

OPINIONS AND ORDERS BELOW

State of Arizona v. Evenson, ___ Ariz. ___,
65 P.3d 433 (Ariz. Sup. Ct. 3/24/03)

State of Arizona v. Evenson, ___Ariz. App. ___,
33 P.3d. 433 (Court of Appeals 10/30/01)

JURISDICTION OF THIS COURT

The order of the Arizona Supreme Court vacating its previous grant of review of the decision of the Arizona Court of Appeals, Division One, was issued March 24, 2003. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 13 of the Rules of this Court as a final judgment entered by a state court of last resort.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I
(Set forth at length in the Appendix at A-35)

United States Constitution, Amendment V
(Set forth at length in the Appendix at A-35)

United States Constitution, Amendment XIV, Section 1
(Set forth at length in the Appendix at A-35)

Arizona Rev. Stat. § 13-3513
(Set forth at length in the Appendix at A-36)

Arizona Rev. Stat. § 13-3506
(Set forth at length in the Appendix at A-37)

Arizona Rev. Stat. § 13-3501
(Set forth at length in the Appendix at A-37)

STATEMENT OF THE CASE

This petition for a writ of certiorari presents serious issues of import for First Amendment jurisprudence, particularly in the area of publishers' rights. The Court is asked to hear Petitioner's case for the purpose of determining that the State of Arizona's law criminalizing certain uses of otherwise lawful news racks violates fundamental First Amendment, Due Process and Equal Protection principles.

During the 1997 legislative session, the Arizona State Legislature enacted A.R.S. §13-3513 into law. The new statute, which makes it unlawful for any person to knowingly display, sell or offer to sell in any coin-operated vending machine any "material harmful to minors, as defined in A.R.S. §13-3501," became effective July 27, 1997. As acknowledged by the State, the Legislature did not engage in any type of "fact-finding" inquiry before implementing A.R.S. §13-3513 in 1997. The law was passed as a "strike everything amendment" to an unrelated bill originally to deal with "illegal alien" problems. Accordingly, there were no public or legislative committee hearings that identified any compelling governmental purpose or harm requiring the new legislation [Appendix (hereinafter "A")-7].

On August 27, 1997, four weeks after the new law took effect, search warrants were served on 15 of Petitioner's news racks. Police officials seized the news racks, newspapers, and coins. At the time of the search, the Maricopa County Attorney orchestrated a media event at the first location of the police seizure, requiring detectives to carry out the seizure wearing "ski masks" to conceal their identity. TR-5/15/00 @ 69;25-71:16; 107:22-108:7; 109;8-12.[1]

On September 4, 1997, only seven days after the seizure, Petitioner Jerome Evenson, publisher of The Beat newspaper (weekly) in Arizona and other states since 1964, became the first and only newspaper publisher ever charged under this new statute. He was indicted on 15 felony counts under the statute. IA-1.

In the first trial, the jury announced that they could not agree on "contemporary state standards." The trial judge refused to clarify the "standards" of the law. Hopelessly deadlocked, with nine of the twelve jurors favoring acquittal, a mistrial was declared. IA-132, 150, 151, 183, 185. In the second trial, Petitioner was convicted on 13 of the 15 counts,[2] and was sentenced to thirteen designated class 6 felonies[3], fined $166,400 ($8000 per count plus a 60% surcharge) and placed on three years felony probation with a proviso that probation would be continued another three years if the

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[1] Numeric designations preceded by "TR" refer to pages of the trial record; numeric designations preceded by "IA" refer to pages of the index on appeal before the Court of Appeals.

[2] Two of newspaper racks did not have papers in them.

[3] The trial judge could have left the convictions undesignated, imposing misdemeanor convictions at the conclusion of the sentence.

fine was not paid. IA-237, 258, 263,264; TR 8/23/2000@39:12-40:8.

The 15 charges arose out of a police requested purchase of a single newspaper dated August 22-28, 1997, identified as Volume 33, No. 29. IA-11. The only complaint was made by a 63-year old male, with no minor children, who first reported he had been "given a copy" at a meeting and then testified that he "found[4]" a copy on a news rack. The complainant stated the investigating officer told him to "purchase" a new copy of The Beat. TR-5/11/2000@8:23-25.

At the time of the criminal indictments, The Beat newspaper contained the news, photos and features of World News Syndicate. IA-11. The Beat has historically featured news stories and editorial opinions of public interest. TR-5/15/00 @ 101:14-17 and 164:21-23. To financially support the newspaper and Petitioner's often controversial opinions, the newspaper printed advertisements from many adult oriented business such as night clubs, licensed escort services, models, masseuses, entertainers, social clubs and adult bookstores. Readers also advertised seeking to meet other adults with similar interests in the classified "personal" section of the newspaper. Many of these advertisers placed similar advertisements in the New Times, Arizona Republic, The Rep, Mesa Tribune and other general circulation newspapers that are also sold or given away from street corner news racks. IA-11.

While models and entertainers exposed female breasts in a minority of advertisements in the August 22-28, 1997 issue, neither male nor female genitalia or

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[4] In this issue there was a news photo of a naked, deformed baby resulting from the Chernobyl nuclear plant accident.

pubic hair are displayed in the newspaper. There are NO four-letter words and NO sexually explicit or obscene language in the newspaper. IA-11. There has never been full frontal nudity or sexual activities depicted in the newspaper.

Phoenix Detective White, the lead investigator, stated he felt there was nothing in the newspaper that was directed towards minors, and that Petitioner Evenson had made absolutely no attempt to get his newspaper into the hands of minors. TR-5/15 @ 107:10-12. In all of his years of working the vice detail, Detective White had never received or heard of a complaint about a minor obtaining or having possession of The Beat newspaper. White admitted that he had no knowledge of any investigative leads involving even a single child who was ever harmed by The Beat during the 33 years of its publication. TR-5/15/00@127:1-5.

Detective White testified that the defendant was not attempting to distribute his newspaper to minors. TR-5/15/00@112:22-25;131;5-9. Detective White told the jury that A.R.S. §13-3513 is so ambiguous and vague that "we don't know this is obscene." He left the decision of what was "harmful to minors" up to the public, not police or prosecutors. TR-5/15/00@ 116:15-25;117:5-10. The trial judge, in chambers, stated to both counsel: "I agree with your description earlier about trying to catch smoke in a net, a lot of that seems to be the case here. To me we're sort of throwing it in their lap and saying, Okay, tell us what the crime is, and to me I have never been in that position before." TR5/16/2001 @15:22-16:2.

There is no evidence, anywhere, that any minor has ever seen, purchased or even showed an interest in a Beat newspaper in its 33 years of existence.

TR5/11/00@13:18-22; TR-5/15/00@3:17-23;TR-5/11/00@47:10-13;TR-8/23/00@39:15-20. The Deputy prosecutor, in the presence of the jury panel, conceded that the State knew of no child who had ever purchased or seen the paper. TR-5/15/00@120:20-121:12. The trial judge, at sentencing, expressly found that there was ". . . no complaint of any parent saying any kid got hold of this . . ." TR-8/3/00@39:17-18. Complaining witness Nelson TR-5/11/00 @ 13:1 3-17;17:16-19, Detective White, TR-5/15/00@127:1-5; Sergeant Thatcher TR-5/15/00@33;12-23 and Detective Lythgoe TR-5/15/00@161:6-10 and the State prosecutor (A 127) all agreed that they had never received complaints about the newspaper impacting minors in any way.

On appeal to the Arizona Court of Appeals, Petitioner raised numerous issues challenging a variety of violations of his Constitutional rights and his rights under State law. As relates to this petition, Petitioner contended that A.R.S. § 13-3513 was a content-oriented restriction of speech that could not survive strict scrutiny because (1) there was absolutely no legislative predicate supporting this invasive criminal law, and (2) the statute did not employ the least restrictive means to accomplish its suspect goal [A 59-74, 157-69,]. Petitioner also argued that A.R.S. § 13-3513 was unconstitutionally vague and violated his rights to equal protection under the law [A 74-83, 169-70]. Finally, Petitioner maintained that his newspaper, The Beat, was simply not harmful to minors [A 70, 73, 204-10].

The Arizona Court of Appeals, Division One, affirmed Petitioner's convictions in a published opinion filed on October 30, 2001 [A 3-25], and an unpublished opinion also filed the same day [A 26-34]. The Court of Appeals improperly rejected Petitioner's contentions, as is shown herein, so Petitioner filed a Petition for

Review with the Arizona Supreme Court raising the important issues now before this Court [A 217-33]. The Arizona Supreme Court granted review and, after briefing and oral argument was completed, refused to decide Petitioner's challenges on the merits. The court instead issued an order dated March 24, 2003, vacating its previous order granting review of the Court of Appeals' decision [A 1-2]. This petition for a writ of certiorari now follows.

Throughout these proceedings, Petitioner Evenson has insisted that the State of Arizona does not have a compelling government interest in the burdens imposed upon his speech rights by A.R.S. § 13-3513, and has refused to waive, compromise or arbitrate rights under State and Federal Constitutions and law.

REASONS FOR GRANTING WRIT

POINT I

THE ARIZONA COURT OF APPEALS ERRED IN RULING THAT THE CONTENT-ORIENTED RESTRICTIONS IMPOSED ON PROTECTED EXPRESSION BY ARIZONA REV. STAT. § 13-3513 SURVIVE STRICT SCRUTINY

In a decision as controversial as it is erroneous, the Arizona Supreme Court let stand a Court of Appeals ruling that gave the State Legislature a bye when it came to satisfying minimum Constitutional standards traditionally applied to laws that restrict speech based on its content. Despite this Court's perennial admonition that content-oriented burdens on the exercise of First Amendment rights must be narrowly tailored to achieve a compelling government interest, and in the face of Petitioner Evenson's

refutation of any claimed compelling government interest to override his First Amendment rights, the Arizona Supreme Court wrongly refused to declare the Constitutional defects of a law that satisfied neither element of the strict scrutiny test. In this undisturbed opinion, the Court of Appeals grossly distorted fundamental First Amendment analysis, misinterpreting United States v. Playboy Entertainment, Inc., 529 U.S. 803, 120 S.Ct. 1878 (2000), and other important decisions of this Court to such an extent that the issuance of a writ of certiorari to the Arizona Supreme Court is required to redress these errors.

This Court has warned that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542 (1992) (citations omitted); see also, Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 828, 115 S.Ct. 2510, 2516 (1995) ["It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys"]. Indeed, in its well known 1972 decision, Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, the Court underscored its abhorrence of prior restraints on speech, explaining that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." Id. at 95, 92 S.Ct. at 2290; see also, Regan v. Time, Inc., 468 U.S. 641, 648-49, 104 S.Ct. 3262 (1984) ["Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"]. Accordingly, Petitioner Evenson has consistently maintained that the State of Arizona does not have a legitimate and cognizable interest in restricting distribution of his newspaper.

When a government regulation burdens protected speech, as in the case of A.R.S. § 13-3513, an analysis must be conducted to determine whether it does so because of disagreement with the content of the regulated speech or merely incidentally while serving purposes unrelated to the content of expression. Boos v. Barry, 485 U.S. 312, 320-21, 108 S.Ct. 1157, 1163 (1988). "Government action that stifles speech on account of its message . . . pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information" Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 641, 114 S.Ct. 2458 (1994). Consequently, such laws are closely scrutinized. Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105, 255, 112 S.Ct. 501, 513 (1991). Content-based restrictions are presumptively invalid and will not survive the applicable strict scrutiny analysis unless the government meets its heavy burden of establishing (1) that the regulation promotes a compelling state interest, and (2) that the government chose the least restrictive means to further the articulated interest. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989).

The 1997 Arizona statute criminalizing the sale through vending machines of material considered harmful to minors provides as follows:

> A. It is unlawful for any person to knowingly display, sell or offer to sell in any coin-operated or slug-operated vending machine or mechanically or electronically controlled vending machine that is located in a public place, other than a public place from which minors are excluded, any material that is harmful to minors as defined in § 13-3501.

B. It is a defense in any prosecution for a violation of subsection A that the defendant has taken reasonable steps to ascertain that the person is eighteen years of age or older and has taken either of the following measures to restrict access to the material that is harmful to minors:

1. Required the person receiving the material that is harmful to minors to use an authorized access or identification card to use the vending machine and has established a procedure to immediately cancel the card of any person after receiving notice that the card has been lost, stolen or used by persons under eighteen years of age or that the card is no longer desired.

2. Required the person receiving the material that is harmful to minors to use a token in order to use the vending machine.

C. A person who violates this section is guilty of a class 6 felony.

Arizona Rev. Stat. § 13-3513.

By its terms, and by acknowledgement of both the Court of Appeals and the prosecutor below, A.R.S. § 13-3513 restricts speech by reference to content [A 9, 125]. Indeed, it employs a traditional "harmful to minors" element, codified at A.R.S. § 13-3501, that necessarily requires the trier-of-fact to determine ex post facto whether the content of the charged material is suitable for people under 18 years of age. A.R.S. § 13-3513(A). Accordingly, the statute is properly viewed as a content-oriented burden

on expression subject to the highest degree of judicial scrutiny.

Faced with the presumption that A.R.S. § 13-3513 is an unconstitutional restraint of protected expression, the burden lay with the State of Arizona to prove that the statute was narrowly tailored to achieve a claimed compelling government interest. Indeed, the State's failure to carry its burden was the central focus of petitioner's contentions before the courts below and remains today at the heart of the arguments advanced on this petition [A 61-74, 154-64, 223-28]. The only "compelling interest" in this case is petitioner's reasonable expectation that he be allowed to publish and distribute his newspaper free of prior government restraints and interference that is not grounded in convincing evidence that the severe burdens imposed by A.R.S. § 13-3513 are necessary to achieve a government interest of the highest order. Arizona's vending machine distribution law is not founded on such evidence.

A. Contrary to this Court's Established Precedent, Arizona Did Not Have a Compelling Reason to Enact A.R.S. § 13-3513.

As argued vigorously below, and as acknowledged by the State, prior to enacting A.R.S. § 13-3513, the Legislature engaged in no fact-finding inquiry concerning the need for this speech inhibiting statute [A 127]. In fact, the legislative history is devoid of indicators that the Legislature considered any evidence that dissemination of non-pornographic publications through coin-operated (not just free) vending machines presented a real risk of harm to minors [A 7, 127]. Review of the entire state court appellate record demonstrates that the Arizona Legislature posited the supposed harm without evidence of its existence in fact, then enacted a remedy for the problem it presumed existed. Such a cavalier legislative process may not present serious

Constitutional questions in some areas of the law, but in the context of speech regulation the absence of a sufficient legislative predicate cannot be excused, especially in the case of a content-based restriction on protected speech.

The Supreme Court recently reiterated this fundamental tenet in United States v. Playboy Entertainment, Inc., supra, relied on by petitioner below. There, Playboy brought a challenge to § 505 of the Telecommunications Act of 1996 (47 U.S.C.§ 561), contending that the scrambling and time channeling requirements imposed on cable television operators with respect to sexually oriented programming violated the First Amendment rights of both subscribers and cable operators. Despite assuming that many adults would find the targeted content "highly offensive" and recognizing that there are legitimate reasons for regulating it, particularly because the sexually explicit programming "comes unwanted into homes where children might see it or hear it against parental wishes or consent"—unlike The Beat, which is not sent into any home and is retailed in locked news racks requiring fifty cents to purchase—the Court struck the law because it impermissibly burdened constitutionally protected expression. Id. at 811, 120 S.Ct. 1878. Noting that "[n]o support for the restriction can be found in the near barren legislative record," Id. at 822, 120 S.Ct. 1878, the Court focused on the lack of evidence that the problem touted by Congress even existed:

> The District Court's thorough discussion exposes a central weakness in the Government's proof: There is little hard evidence of how widespread or how serious the problem of signal bleed is. Indeed, there is no proof as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. To say that

> millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another . . . The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this.

Id. at 819, 120 S.Ct. 1878.

Likewise, to claim that children are at risk of harm from non-obscene newspapers placed in coin-operated vending machines is one thing; proving that this is a true risk is quite another. Here, though the State attempted to avoid such a clear promulgation defect with the argument that "common sense" could substitute for a legislative judgment grounded in fact, the Court of Appeals chose a different tact altogether—ignoring the absence of a pre-enactment legislative record in favor of proof adduced at a trial years later [A 15, 127]. In doing so, the court improperly dismissed the inescapable import of this Court's decision in Playboy Entertainment and other notable First Amendment cases: that the harm to be cured by a proposed restriction on speech must not be merely conjectural. Id.; see also, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509, 89 S.Ct. 733 (1969) ["In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"]. No such showing was made in the passage of this law, or in this case.

In analogous contexts, this Court has not hesitated to reject unsubstantiated claims of a compelling government interest. For instance, in Republican Party of Minnesota v.

White, 536 U.S. 765, 122 S.Ct. 2528 (2002), the Court recently concluded that Minnesota's "announce clause" prohibiting candidates for judicial election from announcing their views on disputed legal and political issues did not survive strict scrutiny because "respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of openmindedness) on which the validity of the announce clause rests." Id. at 781, 122 S.Ct. 2528. Notably, the Court cited Playboy Entertainment in support of this particular conclusion. Id.

The importance of independently establishing the validity of a purported government interest was reiterated in California Democratic Party v. Jones, 530 U.S. 567, 120 S.Ct. 2402 (2000), where seven interests described as compelling by the Government were found to be otherwise by this Court. Id. at 584-85, 120 S.Ct. 2402. Significantly, in rejecting four asserted state interests offered to justify primary election rules—"promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy"—the Court explained that the decision as to what is "compelling" is made by reference to the particular objective of the challenged law, not just some general sense that the law promotes an agreeable goal: "That determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the aspect of fairness, privacy, etc., addressed by the law at issue is highly significant." Id. at 584, 120 S.Ct. 2402.

Similarly, in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613 (1982), the Court did not accept the asserted government interest at face value. Instead, the Government's claim of a compelling interest in mandatory closure of a courtroom in order to encourage minor victims of sex crimes to come forward and provide

accurate testimony was measured against the "empirical support" for the proposition, and found to be lacking:

> The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense.

Id. at 609-10, 102 S.Ct. 2613.

Yet another decision of this Court underscores the Court's reluctance to simply accept, on its face, the asserted significance of an interest described as compelling by the Government. In Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535 (1978), the State justified the application of criminal penalties to third parties who disclose or publish truthful information concerning the proceedings of a judicial review commission on the ground that it had a compelling interest in preserving the confidentiality of such proceedings. This Court assumed that the State had a legitimate interest in confidentiality, but concluded that the stated interest was not compelling, observing that the Commonwealth had "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined." Id. at 841, 98 S.Ct. 1535.

In the instant case, the Arizona Court of Appeals avoided its Constitutional obligation to look past the mere assertion of a compelling government interest to the critical question of whether the Arizona Legislature had more than a speculative or conjectural basis for enactment of A.R.S. §

13-3513. Had it done so, the result would have been obvious: invalidation of the statute on the ground that the State did not substantiate the supposedly compelling nature of its claimed interest. As Petitioner Evenson argued to the Arizona Supreme Court, "the Legislature and the prosecution have failed to provide a single instance where any minor, even one minor, has ever been in the possession of The Beat newspaper. There is no evidence, anywhere, that there was any problem with children accessing Appellant's news racks, or any similar news racks" [A 227]. Indeed, the record in petitioner's case indicates that had the Legislature conducted fact-finding hearings or relied on studies or credible evidence of any kind, its conclusion as to the need for A.R.S. § 13-3513 may well have been entirely different. It was uncontested before the Court of Appeals that petitioner's newspaper, The Beat, had been published for thirty-three years at a rate of eight thousand to twelve thousand issues sold from news racks each week, without a single complaint or incident related to a minor inappropriately obtaining a copy of the publication [A 7, 51-56, 154-56, 209-10]. Furthermore, even the police officers who testified at petitioner's trial candidly acknowledged that petitioner had not attempted to distribute The Beat newspaper to minors, and that they had never received a single complaint about a minor obtaining a copy of the publication [A 54-58, 154]. The lack of any fact-finding by the Legislature prior to the enactment of A.R.S. § 13-3513 precluded the discovery of such facts clearly militating against a determination that any real problem existed or was likely to exist in the future.

That a law burdening expression by reference to its content may not be justified years after-the-fact is evident from a historical survey of this Court's most notable strict scrutiny decisions, as well as by reference to the Court's recent emphasis on the need for a sufficient legislative

predicate in cases involving content-neutral regulations of speech.

A content-based restriction on speech may be imposed only where there is a "clear and present danger that [the speech] will bring about the substantive evils that the [government] has a right to prevent." Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249 (1919). The evils sought to be prevented must "rise far above public inconvenience, annoyance, or unrest." Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896 (1949). As Justice Black explained for the Court in Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941):

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

Id. at 263, 62 S.Ct. at 194. Read in conjunction with the Court's decision in Playboy Entertainment, it is beyond dispute that the Legislature was not free to adopt a content-based restriction of petitioner's right to distribute The Beat without first establishing a risk of harm sufficient to meet

the "extremely serious" substantive evil standard insisted upon by the Bridges Court—a burden the State of Arizona could not meet, particularly in light of the fact that The Beat's content is far tamer even than Playboy [A 68-69].

Moreover, that a pertinent and sufficient legislative record would be required to sustain a content-neutral regulation of speech, but not a content-oriented regulation, is illogical. The Court's recent decision in City of Los Angeles v. Alameda Books, 535 U.S. 425, 122 S.Ct. 1728 (2002), underscores the necessity of evidentiary support for the claimed government interest—whether compelling or simply significant—offered as justification for a speech restriction. There, the plurality explained that even a content-neutral zoning ordinance must have an evidentiary basis demonstrating the existence of a substantial, independent government interest, and warned that "[t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." Id. at 438, 122 S.Ct. 1728. It is beyond comprehension that this Court would require any less substantiation of a government interest held out to be sufficiently compelling to justify a content-based restriction on speech.

The Legislature's failure to offer even baseless speculation that A.R.S. § 13-3513 was necessary to prevent access by minors to so-called harmful materials is fatal to the statute. Issuance of the requested writ is warranted to correct an error of law by the Arizona appellate courts that has substantially diminished the Constitutional protections that this Court has historically enforced.

B. A.R.S. § 13-3513 does not Employ Least Restrictive Means in Accomplishing Its Asserted Goal.

Compounding the Constitutional repugnancy of A.R.S. § 13-3513 is its overbreadth. In failing to create an objective evidentiary record to support the State's claimed interest in restricting the dissemination of non-hardcore newspapers such as The Beat, the Arizona Legislature not surprisingly failed to consider less restrictive means of achieving its content-oriented goal. Quite simply, the Arizona Court of Appeals erred in deciding, over Petitioner Evenson's vigorous objection, that the challenged statute was narrowly tailored.

As this Court emphasized in Playboy Entertainment, supra, "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." Id. at 816, 120 S.Ct. 1878. Petitioner Evenson put the State to its proof on this point, arguing that at least two obvious means existed to accomplish Arizona's objective without impermissibly interfering with the established First Amendment rights of Petitioner and others.

First, A.R.S. § 13-3513 achieved nothing not already accomplished by the pre-existing State law criminalizing the offering or furnishing of harmful materials to minors. See A.R.S. §§ 13-3506 and 13-3507[5]. Enacted during the 1970's, these laws were available for enforcement against Petitioner if, in fact, there was any proof, or even allegations, that The Beat was obtained by minors and that its content was harmful to them. This obviously was not the case given that the seasoned police officers who testified at trial had never even received a complaint that this was occurring [A 54-58, 154].

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[5] § 13-3506(A) makes it unlawful "for any person, with knowledge of the character of the item involved, to recklessly furnish, present, provide, make available, give, lend, show, advertise or distribute to minors any item that is harmful to minors."

The Arizona Court of Appeals' reasoning that A.R.S. § 13-3513 is less restrictive than A.R.S. § 13-3506 is fundamentally flawed. Contrary to the lower court's decision, A.R.S. § 13-3513 does not afford publishers like Petitioner Evenson a "safe harbor". Rather, in order to gain the advantage of an affirmative defense to prosecution, A.R.S. § 13-3513(B) requires that publishers modify vending machines so that purchasers must use either tokens or access cards to obtain a newspaper. As explained below herein, this solution is not practicable. Any token mechanism presently available will work only with tokens the exact size as United States coins, defeating the purpose of the token requirement [A 228]. Moreover, contrary to the State's argument, requiring Petitioner to pay for a prohibitively expensive identification card access system and requiring patrons to either obtain such identification cards prior to purchase of a fifty cent newspaper or search out a retailer who will sell them a token is not a less restrictive alternative than simply enforcing A.R.S. § 13-3506.

Second, if there was any proof that The Beat or any similar publication was getting into the hands of minors, an appropriately speech sensitive method of addressing the situation would be an investigation of the circumstances to determine the significance of the problem, if any, and adoption of locational restrictions to prevent the operation of news racks in identified problem areas. Of course, no such investigation was undertaken prior to enactment of A.R.S. § 13-3513, so there is no evidence of a problem in the first instance.

The Court of Appeals' rejection of these plausible alternatives relieved the State of its obligation to demonstrate that such alternatives would be ineffective in achieving the State's goals. United States v. Playboy Entertainment Group, Inc., supra. It is inconceivable that

laying the expense of retrofitting hundreds of news racks with expensive identification card or non-existent token mechanisms, and requiring the publisher to gain the cooperation of retailers to sell tokens, is less restrictive than simply enforcing A.R.S. § 13-3506. Indeed, the idea that a retailer would be willing to assume the age verification obligation and the risk of prosecution in the event of an age identification error - -all for a small portion of the fifty cents price - - is preposterous. Similarly, it is illogical and disingenuous to reject Petitioner's plausible suggestion that the State research whether a problem even exists and, if so, consider locational restrictions on the operation of news racks, while simultaneously accepting the State's unproven contention that such locational restrictions would be ineffective.

Petitioner Evenson has consistently argued that the State of Arizona does not have the authority to criminalize the distribution of his newspaper, The Beat, without proof of actual harm. That contention is firmly supported by this Court's prior decisions, and the facts of this case that conclusively demonstrate that Arizona did not have a legitimate and cognizable interest in enacting A.R.S. § 13-3513. This serious Constitutional deficiency is exacerbated by the challenged statute's overbreadth. Issuance of the requested writ of certiorari is necessary to remedy this miscarriage of justice.

POINT II

A.R.S. § 13-3513 Violates Petitioner's Rights to Equal Protection Under the Law

Under the Equal Protection Clause, "[t]here is an 'equality of status in the field of ideas' and government must afford all points of view an equal opportunity to be

heard." See, Police Department of the City of Chicago v. Mosley, 408 U.S. 226, 92 S.Ct. 2286 (1972). Because the Chicago ordinance at issue in Mosley regulated speech based on its content, this Court reviewed the equal protection claim under a strict scrutiny analysis and found the ordinance unconstitutional because it discriminated against one type of speech in favor of another.

It is well established that the principles of equal protection and the First Amendment are intertwined. See, Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 227, n.3, 107 S.Ct. 1722 (D.C. Cir. 1993). Indeed, on review of content-based distinctions, the Supreme Court has not differentiated the Equal Protection Clause from the First Amendment. See, R.A.V. v. The City of St. Paul, 505 U.S. at 384, n.4, 112 S.Ct. 2538.

"While surprising at first glance, the notion that a regulation of speech may be impermissibly under-inclusive is firmly grounded in basic First Amendment principles." See, City of Ladue v. Gilleo, 512 U.S. 43, 51, 114 S.Ct. 2038 (1994) (footnote omitted). Though under-inclusiveness often concerns an attempt by Government officials to treat certain speech or viewpoints more favorably than others, "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." Id. at 52-53 (citation omitted).

Contrary to the opinion of the Arizona Court of Appeals, Petitioner Evenson does not contend that A.R.S. § 13-3513 is under-inclusive merely because "it does not regulate other purveyors of sexually-explicit material, such as those on television, radio, and the Internet." [A 21]. Rather, Petitioner contends that the statute's obvious under-

inclusiveness, even if excused under the rationale that state legislators do not have to simultaneously address all of society's ills, unconstitutionally increases the burden set against Petitioner's speech rights by substantially increasing the difficulty of ascertaining a comprehensible standard of what is harmful to minors, to the point that it has now become impossible to do so with any reasonable degree of certainty.

It cannot be disputed that everyday experiences for young people in American society routinely expose them to graphic sexual content, violence and other base aspects of community life. Whether it is exposure to "PG-13" and "R" rated movies on cable and satellite television or found in the local movie theater, or more salacious fare readily available through any Internet connection, almost everyone in society whether they be a child, an adolescent, or an adult comes within the scope of influence of potentially harmful messages from a multitude of mediums. "Material similar to that in The Beat is readily available to minors and everyone else in movies and on television, particularly cable television, as well as in magazines and newspapers" [Feldman, J., dissenting at A 2]. Yet within this milieu of commonly encountered, possibly harmful experiences, publishers like Petitioner Evenson are saddled with the responsibility of deciphering what these common experiences mean in the context of contemporary community standards with respect to what is not harmful for minors. See, A.R.S. § 13-3501(1)(a). In today's society no community or state is an isolated pocket that is not influenced by TV, cable, radio, movies, recordings, the Internet and the myriad of entertainment and communication facilities. Except for "weights and measures," all contemporary standards are subject to a constant state of flux. As the courts have affirmed, states cannot, and should not, regulate or control free speech that crosses state and international boundaries. Yet, without

such comparison of what is readily available in the community, a local publisher cannot determine in advance what contemporary standards exist. To deny writers, editors and publishers the use of comparative values when making editorial decisions is to hold that person to an unequal set of standards and require him to exercise First and Fourteenth Amendment Rights in virtual vacuum.

The inherently amorphous "harmless to minors" standard would be difficult enough to measure if, hypothetically, Arizona's laws consistently addressed all relevant social harms on an equal basis. However, as the Court of Appeals acknowledged in its opinion, such circumstances do not exist, making an otherwise extraordinarily difficult predictive task impossible [A 21].

In this instance, where the Court is confronted with an admittedly content-based restriction of Petitioner's First Amendment rights, strict scrutiny requires the State of Arizona to justify A.S.R. § 13-3513's under-inclusiveness without reference to the self-serving reasoning that the Legislature should not be held accountable for the unwarranted impositions on the constitutionally protected expressive rights of Petitioner Evenson and other publishers. The Legislature's refusal, or inability, to address other pervasive harms in a fashion that will permit publishers a reasonable opportunity to understand what the law requires further compounds the vagueness. Accordingly, this Court should issue a writ of certiorari for the purpose of considering these crucial First and Fourteenth Amendment issues.

POINT III

A.R.S. § 13-3513 IS UNCONSTITUTIONALLY VAGUE

Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843 (1972), quoting Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939). This tenet is a fundamental element of due process and a law that is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits" violates the Due Process Clause. City of Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct. 1849, 1859 (1999), quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 520-21 (1966).

Special care, then, must be taken in the case of speech regulations to avoid ambiguity detrimental to a clear understanding of the meaning of a law on the part of both laymen and the officials charged with enforcing it. See, Smith v. California, 361 U.S. 147, 151, 80 S.Ct. 215, 217-18 (1960) [" . . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here because the free dissemination of ideas may be the loser"]. As the Supreme Court has warned, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Cantwell v. State of Connecticut, 310 U.S. 296, 304, 60 S.Ct. 900, 903 (1940). This is never truer than in the area of First Amendment rights:

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the

> punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press.

Winters v. New York, 333 U.S. 507, 509-10, 68 S.Ct. 665, 667 (1948).

Thus, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99 (1972); see also, Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926). Accordingly, the void for vagueness doctrine requires that precise standards be enacted so that the average person has an opportunity to know how to conform his conduct to the law and to prevent arbitrary and subjective enforcement of a law's provisions.

In the instant case, Petitioner Evenson was deprived of his due process rights by enforcement of a vague, content-based law. A.R.S. § 13-3513 fails to give sufficiently precise notice of the scope of its application, thereby chilling the exercise of protected expressive rights by Petitioner and others.

The obvious vagueness of A.R.S. § 13-3513 is compounded by the statute's failure to require that what is harmful to minors be determined by reference to the actual community standards extant at the time of the alleged offense. As Petitioner argued to the Arizona Supreme Court, "[t]he instructions negated any possibility that the jury's findings would give any reasonable person a clear indication of what 'contemporary state standards' are, or were at the time, and unfairly prevented him from obtaining a fair trial" [A 231]. In this instance, the verdict in Petitioner's case was delayed for two and one-half years, but the jury was not held to a requirement that it limit its consideration of the contemporary community standard to proof of that standard as it existed at the time of the charged offense.

Further compounding this vagueness problem is the fact that A.R.S. § 13-3513 does not define a particular species of work it governs, leaving that determination instead to the provisions of A.R.S. § 13-3501. "Newspapers", however, are not listed among the many works itemized by A.R.S. § 13-3501. This inherent vagueness and the treatment of "materials harmful to minors" by these two different statutes gave the Arizona Court of Appeals opportunity to decide for itself, after the fact, that the Legislature intended "to treat the sale of 'adult' oriented newspapers and 'adult' magazines the same way." [A 7, footnote 3 to Court of Appeals' Opinion]. Thus, despite the fact that A.R.S. § 13-3501 has been amended four times since 1964 without the Legislature ever including "newspapers" among the very specific list of harmful items, the Court of Appeals retroactively read "newspapers" into the statute, thereby depriving Petitioner of advance notice of what is proscribed.

The vagueness inherent in A.R.S. § 13-3513 and the related statutes deprived Petitioner of due process of law.

Accordingly, this Court should issue the requested writ of certiorari for the purposes of bringing Arizona's content-orientated scheme into compliance with fundamental First Amendment principles.

POINT IV

THE BEAT IS NOT CONSTITUTIONALLY HARMFUL TO MINORS

This Court is empowered to make an independent determination of The Beat's harmfulness vel non to minors. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707, 88 S.Ct. 1298 (1968) ["the question of whether particular material is obscene inherently entails a Constitutional judgment for which the Court has ultimate responsibility, and hence that it is incumbent upon us to judge for ourselves, de novo as it were, the obscenity vel non of the challenged matter"]; see also, Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676 (1964). Review of the charged issue of The Beat establishes that, as a matter of law, Petitioner's newspaper is not harmful to minors.

The August 22-28, 1997, issue of The Beat seized by Phoenix police was most notable for its innocuousness. In a 44-page issue, the various articles contained neither sexually explicit language nor swear words. The newspaper did not depict male or female genitalia or pubic hair, and only 53 display advertisements contained topless photographs of dancers and models. 138 other display advertisements displayed no female toplessness or nudity of any kind. Topless photographs comprised only 16 percent of the total printed area of The Beat newspaper, and the remainder of the publication did not contain sexually explicit news items or commentary [A 50-51].

As Justice Feldman observed in his dissent from the Arizona Supreme Court's vacatur of the grant of review:

> The publication contains nothing obscene or pornographic and portrays no sexual act, unless one believes that depicting the female breast or advertising "personal" services is either obscene, pornographic, or sexually explicit. Material similar to that in The Beat is readily available to minors and everyone else in movies and on television, particularly cable television, as well as in magazines and newspapers. Thus, I cannot agree that these exquisitely tacky ads for exotic dance clubs and undescribed personal services may support a criminal conviction, absent some evidence that minors have been or could be harmed by the material. In fact, in this case, there was no evidence that any minor ever saw any of the material or would even be allowed in any of the clubs [A 1-2].

Unlike the hardcore content which was the focus of the Court's concern in Miller v. California, 413 U.S. 15 (1973) or the full frontal nudity and explicit sexual conduct intruding into the home in Playboy Entertainment, supra, the content of The Beat is remarkably more tame. Indeed, the limited depiction of toplessness in Petitioner's newspaper pales in comparison to what young people can readily see on cable or satellite television or in "PG-13" and "R" rated movies regularly exhibited in local theaters. See, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389 (2002).

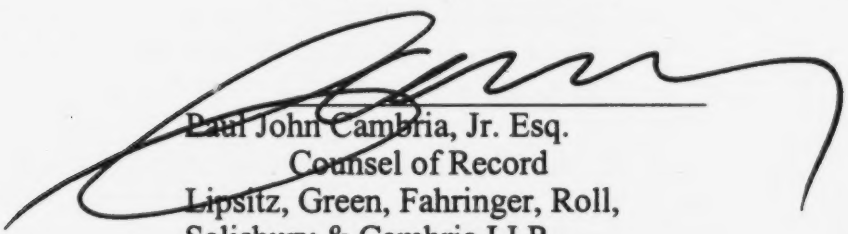
While a court may be inclined to defer to the decisions of a local jury regarding contemporary community standards of "harmful" materials, the decision in this case was a retroactive finding and provided no guidelines to

prevent a repeat prosecution. With no evidence of harm to a minor, it cannot be said beyond a reasonable doubt that The Beat newspaper issue charged was harmful to minors and warranted 13 felony convictions.

CONCLUSION

Petitioner respectfully submits that the Court should grant his petition for a writ of certiorari for the purpose of reviewing and reversing his unlawful conviction under an Arizona criminal law that violates the Rights guaranteed to him as a citizen, and as a publisher, by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,



Paul John Cambria, Jr. Esq.
Counsel of Record
Lipsitz, Green, Fahringer, Roll,
Salisbury & Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

Of Counsel:
Roger W. Wilcox, Jr., Esq.